In the

Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1960

No.

WRAY EQUIPMENT CORPORATION,
PETITIONER,

v.

WESTINGHOUSE ELECTRIC CORPORATION AND
ALD NEW YORK INC.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is not yet reported but is printed in Ap-

pendix A to this petition.[1] The District Court did not file an opinion. The District Court's Findings of Fact and Conclusions of Law are found in the Consolidated Record Appendix beginning at p. 1623.[2]

Jurisdiction

The judgment of the Court of Appeals was entered on February 2, 1961. The petition for rehearing was denied on February 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

In a seven-year-old antitrust case tried without a jury, where defendants contended that the trial judge displayed prejudice against them throughout a 28-day trial but where defendants raised the matter of prejudice for the first time on appeal, whether a court of appeals is justified in vacating a judgment for plaintiff and remanding the case for re-trial before another judge on the ground of the original trial judge's prejudice:

(a) without any specification of the prejudice allegedly shown by the trial judge except for the possible commission of harmless error in the admission of evidence; and

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[1] (App. A) as used hereinafter refers to the opinion of the Court of Appeals as printed in Appendix A.

[2] Both respondents appealed from the judgment of the District Court. The appeal of respondent Westinghouse Electric Corporation was docketed in the Court of Appeals as No. 5682 and that of respondent ALD, New York, Inc. as No. 5683. The record in both appeals was consolidated and consists of three volumes. Volumes I and II contain pleadings and testimony. Volume III contains exhibits and Proceedings in Court of Appeals. This consolidated record will be referred to hereinafter as R.A. followed by the appropriate page number.

(b) without any consideration of the merits of the case.

Statutes Involved

The statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. Sections 1 and 2 and Sections 3 and 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Sections 14 and 15, all of which are set forth in Appendix B to this petition, pp. 25 and 26.

Statement of the Case

I. Proceedings Below

Petitioner, a Massachusetts corporation, was at all pertinent times engaged in selling machinery and equipment to operators of so-called automatic half-hour laundries. Respondent ALD New York, Inc., a New York corporation (hereinafter ALD), was engaged in the same business as petitioner. Respondent Westinghouse Electric Corporation a Pennsylvania corporation (hereinafter Westinghouse), was engaged, among other things, in manufacturing and selling 9-pound washing machines for use in half-hour laundries.

On February 4, 1954, petitioner filed a complaint in the United States District Court for the District of Massachusetts (R.A. 13). In substance the complaint alleged that the respondents combined and conspired to restrain and monopolize, and entered into unlawful agreements with respect to, interstate commerce in half-hour laundry machinery, in violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. It was further alleged that the unlawful conduct of respondents consisted, in part, of their exclusive dealing arrangements as to the

Westinghouse 9-pound washing machine accompanied by tie-in sales of other laundry equipment; of their refusal to deal with petitioner; and of threats to other makers of laundry machines to prevent their dealing with petitioner. As a result, according to the complaint, petitioner was injured in its business.

Respondents' answers denied most of the material allegations of the complaint.

Trial of the case commenced on October 8, 1958. Testimony was taken intermittently on 28-days, concluding on January 13, 1959. Both respondents filed motions to dismiss (R.A. 1581) and motions to strike certain evidence (R.A. 1585, 1614). All parties submitted requests for findings of fact, conclusions of law and briefs and presented oral argument. On February 18, 1960, the District Court filed its Findings of Fact and Conclusions of Law in which it was ruled that, through their violations of the antitrust laws, respondents had injured petitioner to the extent of $55,000.00 (R.A. 1623-1632).

Thereafter, petitioner applied for the allowance of counsel fees and costs and for the entry of a judgment for treble the amount of the damages found, plus any costs and counsel fees which might be awarded. This matter was briefed and argued orally by the parties. On March 25, 1960, the District Court entered a judgment totalling $198,102.84 in favor of petitioner and against both respondents (R.A. 1633-1634).

Westinghouse filed its notice of appeal on April 5, 1960 and ALD followed with its notice on April 8, 1960. (R.A. 1634).

It should be noted that at no stage of the pre-trial and trial proceedings, all of which were administered by the same judge and which encompassed the period between February 4, 1954 and April 5, 1960, did respondents bring to the judge's notice any claim that a single ruling was

prompted by bias or prejudice. Respondents raised the question of prejudice for the first time on appeal.

On February 2, 1961, the Court of Appeals filed its opinion and entered its judgment vacating the judgment of the District Court and remanding the cause for a new trial before a different judge. As will be stated more fully below, the Court of Appeals based its action upon its finding of a prejudicial attitude on the part of the trial judge.

II. Summary of Findings of Fact and Conclusions of Law of the District Court

The Findings of Fact and Conclusions of Law of the District Court (R.A. pp. 1623-1632), may be summarized as follows:

The District Court found that Westinghouse had granted respondent ALD and its parent ALD, Inc. the exclusive right to buy and re-sell the commercial Westinghouse 9-pound washing machine (known as a Laundromat) to half-hour laundries. This exclusive arrangement also delegated solely to the ALD companies the authority to permit the half-hour laundries to advertise themselves as Westinghouse stores. The ALD companies reciprocated by agreeing to buy and re-sell no 9-pound washers except the Westinghouse Laundromat.

According to the District Court's findings the commercial Laundromat, in construction and performance, is a unique and superior 9-pound washer for use in half-hour laundries. This circumstance resulted in such expansion of the sales of commercial Laundromats that during the period of the case more of those machines were sold to half-hour laundries than all other makes combined. Similarly, the Laundromat outstripped all competitive products in sales in the New England area.

The District Court also found that, although the primary

concern of the half-hour laundry operators was to obtain commercial Laundromats, the operator also needed associated equipment such as driers, extractors, boilers and the like. Westinghouse did not manufacture this associated equipment. Nevertheless, Westinghouse permitted the operator to advertise his store as an "Authorized Westinghouse Laundromat Equipped Half-Hour Laundry" with the knowledge that it contained much of this non-Westinghouse machinery.

The evidence also demonstrated, according to the District Court, that the ALD organization instructed its salesmen and announced to the trade that if the half-hour laundry operator wanted to obtain the commercial Laundromat, he would also have to buy all needed non-Westinghouse equipment from ALD. Westinghouse was found to have acquiesced in this practice.

In its early days, petitioner, which the District Court found to be comparable to ALD in ability to serve the trade, made purchases of Laundromats from ALD for resale to new half-hour laundries. ALD was found to have known of petitioner's intended use of these machines. However, upon a subsequent order from petitioner and thereafter both ALD and Westinghouse refused to furnish Laundromats to petitioner. This refusal was determined to be without justification by the District Court.

The District Court also found that ALD tortiously interfered with petitioner's business relationships with suppliers of equipment. In that connection, the District Court mentioned two such suppliers, Hoyt Manufacturing Corporation and Cook Machinery Company.

As to the Cook company, the District Court found that it had been acquired by respondent ALD's parent, ALD, Inc., and that thereupon petitioner had been denied its previously exercised right to purchase 25-pound washing

machines made by Cook. The Court of Appeals made no mention of this Cook incident in its opinion.

The District Court also found that, because of the coercion of ALD, the Hoyt company refused to sell a dryer to petitioner to fill a particular order. In making the finding, the District Court quoted this statement of Hoyt, the company president, as to the pressure exerted by ALD:

> I tried to exercise a certain amount of prudence. If a man is going to hold me up, I am not going to find out whether he has a bullet in his gun.

As will be explained below, the Court of Appeals singled out the District Court's reception and use of the quoted statement as the primary facts bearing upon the District Court's so-called prejudice.

As the result of the above-summarized and other acts of respondents, the District Court found that petitioner was not only prevented from selling Westinghouse Laundromats but was also prevented from selling other laundry machines not made by Westinghouse. Petitioner's damages were determined to be $55,000.

From its fact findings, the District Court drew a number of legal conclusions. Its basic conclusions were three. First, it held that respondents injured petitioner in its business by combining to restrain a "not insubstantial" amount of interstate commerce in automatic laundry machines in violation of Section 1 of the Sherman Act. Secondly, the District Court concluded that respondents had damaged petitioner by monopolizing and attempting to monopolize an appreciable segment of the laundry machine trade in violation of Section 2 of the Sherman Act. Finally, the District Court ruled that the tie-in sales of Westinghouse and non-Westinghouse equipment imposed on half-hour laundries by respondents injured petitioner and wrought a substan-

tial lessening of competition in violation of Section 3 of the Clayton Act. Accordingly, the District Court concluded as a matter of law that respondents' violations of the anti-trust laws resulted in damages to petitioner to the extent of $55,000.00.

III. Summary of Opinion of the Court of Appeals

The opinion of the Court of Appeals specifies that the District Court committed prejudicial error in receiving one piece of evidence and that the District Court departed from orderly procedure in treating with deposition testimony. Without identifying any portion of the record to support the charge, the opinion also concludes with the statement that a reading of the record shows that the District Court was prejudiced in favor of petitioner.

The Court of Appeals assigned as prejudicial error the District Court's reception in evidence and use in findings of the colorful "gun" statement of the Hoyt president referred to in the summary of the District Court's findings (App. A. 20-23).

As appears from the Court of Appeals opinion, Hoyt made the statement at a deposition given a few months after the incident took place, but more than four years before trial. As his memory was somewhat hazy when a witness at trial, petitioner's counsel read the quotation in question to him for two purposes, to refresh his recollection or to show a prior inconsistent statement.

The Court of Appeals concluded that Hoyt's memory was not refreshed by the reading of the deposition; that he did not adopt the deposition statement as his present recollection; that a majority of cases do not allow a prior statement to be received in evidence as a prior inconsistent statement and that it was prejudicial error to receive that particular statement on any theory (App. A. 22, 23).

The Court of Appeals did not discuss the question of whether the Hoyt statement was essential to the finding that ALD had exerted undue pressure on Hoyt Manufacturing Corporation; or the question of whether the Hoyt Manufacturing Corporation incident was essential to the finding that ALD had tortiously interfered with petitioner's arrangements with suppliers; or the question of whether the finding as to tortious interference was essential to the ultimate conclusion reached by the District Court. As will be pointed out under Reasons for Granting the Writ, the Hoyt statement was a picturesque but trivial item of proof with respect to an independently proved incident which could not have changed the ultimate outcome even if not proved. If error, it will be shown to be harmless.

It is not argumentative to state that the second fault found by the Court of Appeals is of even less consequence than the first. In the early stages of the trial, petitioner read into evidence certain portions of depositions. Thereupon, respondents requested that petitioner read other portions claimed to be related to the parts already read. Petitioner objected to reading such portions and claimed that they formed a part of respondents' case. The District Court sustained petitioner's objection. Later, respondents read such portions into the record and petitioner offered in evidence as a part of its own case the portions read by respondents (App. A. 23-24).

The Court of Appeals ruled that the District Court's treatment of this deposition testimony was faulty because the supplementary testimony read by respondent was separated by more than 1000 pages of the transcript from the deposition testimony read by petitioner. The Court of Appeals stated that such a wide separation of relevant parts of a deposition "unduly impedes the orderly consideration of the deposition testimony, even in a non-jury case." (App. A. 23-24).

After its discussion of the Hoyt testimony and the deposition testimony situations, the Court of Appeals concluded its opinion with the sweeping and serious charge that a reading of approximately 2000 pages of transcript showed that the trial judge was prejudiced in favor of petitioner (App. A. 24). To support this conclusion, the Court of Appeals mentioned that there were several indications of prejudice manifested by the District Court's "cross-examination" of respondents' witnesses (App. A. 24). The Court of Appeals did not identify a single instance of improper "cross-examination" by the District Court and it did not advert to the fact that the District Court also questioned petitioner's witnesses (e.g., R.A. 119, 398). Finally, the Court of Appeals speculated that the District Court's prejudice may have resulted from the Hoyt reference to the gun (App. A. 24). For these reasons, the Court of Appeals vacated the judgment in favor of petitioner and ordered a re-trial before a new judge.

Reasons for Granting the Writ

I. The Failure of Respondents to Raise the Issue of Prejudice at Trial

The principal reason for the Court of Appeals' vacating the District Court's judgment in favor of petitioner and remanding for a new trial before a different judge was its conclusion that the trial judge was prejudiced. This issue of prejudice was never raised by respondents during the four years of pre-trial rulings by the same judge. As the docket entries show there were many such rulings (R.A. 1-7). The issue was never raised by respondents at any time during the 28-day trial. It was not raised at the final oral argument held before submission of the case to the

District Court for decision. It was not made the subject of a motion for new trial.

Respondents gave the trial judge no opportunity to disqualify himself. Indeed, they gave the trial judge no hint or inkling that they believed he was doing anything other than ruling according to the law and facts as he saw them during the protracted trial. They waited to see whether the trial judge would find in their favor. When he did not, they then claimed before another court, the Court of Appeals, that the trial judge had displayed bias and prejudice.

The Court of Appeals' reversal of the District Court's judgment under these circumstances was in conflict with decisions of this Court and in conflict with decisions of other federal courts of appeals.

If there is one rule pertaining to the questions properly to be considered on appeal which is uniformly applied, it is that where the appellant has failed to object to rulings or conditions below, he may not raise them on appeal, in the absence of rare and unusual circumstances. *Becker Steel Co. of America v. Cummings*, 296 U.S. 74; *Socony-Vacuum Oil Co. v. United States*, 310 U.S. 150, 238, 239; *Scott v. Beams* (C.A. 10, 1941) 122 F.2d 777, 782, 789, cert. den. 315 U.S. 809; *Suburban Transit Corporation v. Malone* (C.A. 4, 1946) 156 F.2d 422; *Dowell, Inc. v. Jowers* (C.A. 5, 1950) 182 F.2d 576, 579; *Slattery v. Marra Bros.*, (C.A. 2, 1951) 186 F.2d 134, 137, cert. den. 341 U.S. 915; *Baker v. Mueller*, (C.A. 7, 1955) 222 F.2d 180, 183.

Petitioner concedes that if the record shows a clear manifestation of bias of the trial judge, an appellate court may take cognizance of the fact even though the issue were not raised at trial. However, in the cases cited above, showings were made of trial proceedings much more likely to be prejudicial to the litigants than those the Court of Appeals was able to muster in this case.

In *Dowell*, the trial judge made remarks in the presence of a jury which were claimed to be prejudicial. The Court of Appeals for the Fifth Circuit held that it was appellant's duty to make a seasonable objection. In *Slattery*, appellant raised the issue that the trial judge's questioning of witnesses was prejudicial and that it posed such a serious problem that it should be noticed on appeal even though not brought out below. The Court of Appeals for the Second Circuit, through Judge Learned Hand, held that timely objections should have been made even if the error were serious. The Court of Appeals for the Seventh Circuit in *Baker* refused to consider the question of whether the trial judge should have disqualified himself, because the point was not raised in the District Court. In *Scott*, the Court of Appeals for the Tenth Circuit held that the question of whether the trial judge was prejudiced was not timely raised because, although brought to the attention of the trial judge before appeal, it was not raised until sixty days after the alleged prejudice became apparent.

Here, the alleged prejudice was not raised for more than eighteen months after respondents claimed it became apparent. Moreover, according to the opinion of the Court of Appeals in this case, the only demonstration of prejudice by the trial judge consisted of one instance of admitting some testimony which should not have been admitted, of one instance of not following an orderly procedure in the admission of evidence and of some undescribed and unidentified "cross-examination" of witnesses. This showing falls far short of the unusual circumstances which permit an appellate court to consider alleged errors not claimed below. Furthermore, as will be demonstrated below, the Court of Appeals' holding that any of these three types of actions by the District Court would amount to prejudicial error is in conflict with decisions of other federal appellate courts.

II. The Harmless Effect of the Hoyt Deposition Testimony

Before reaching the question as to whether the Hoyt deposition testimony was improperly admitted to prove that Hoyt Manufacturing Corporation was coerced by ALD, it should be pointed out that under the facts which it found the District Court was required to reach its ultimate decision regardless of the entire Hoyt incident.

The District Court found that respondents had a mutually exclusive arrangement whereby Westinghouse would sell its 9-pound washer only to the ALD companies and the ALD companies would buy no 9-pound washer other than the Westinghouse Laundromat; that the Westinghouse Laundromat was unique among 9-pound washers and was most in demand by half-hour laundries; that ALD would sell the Laundromat to half-hour laundries only on condition that they would buy their necessary non-Westinghouse-made equipment from ALD; that the 9-pound washer was the most important piece of equipment in a half-hour laundry; that petitioner was at first permitted to buy the Westinghouse Laundromat but was later unjustifiably denied the right to purchase the machine by both respondents; that petitioner was, thereby, not only prevented from selling Westinghouse Laundromats but other laundry equipment to those half-hour laundries which demanded the Laundromat; and that the interstate commerce in the Westinghouse and non-Westinghouse equipment involved in the case was appreciable in extent (R.A. 1623-1632).

From these facts, apart from the Hoyt incident, the District Court would have been required to conclude that respondents violated Section 1 of the Sherman Act to the injury of petitioner's business. *Associated Press* v. *United States*, 326 U.S. 1; *International Salt Co.* v. *United States*, 332 U.S. 392, 396; *Northern Pacific Railway* v. *United*

States, 356 U.S. 1, 10, 11; *Oxford Varnish Corporation* v. *Ault & Wiborg Corporation* (C.A. 6, 1936) 83 F.2d 764; *Osborn* v. *Sinclair Refining Co.* (C.A. 4, 1960) not yet officially reported but found in 1960 Trade Cases, p. 77030.

The same activities of respondents also constituted a violation of Section 2 of the Sherman Act to petitioner's damage. *United States* v. *Yellow Cab*, 332 U.S. 218; *Kobe, Inc.* v. *Dempsey Pump Co.* (C.A. 10, 1952) 198 F.2d 416, 423, cert. den. 344 U.S. 837.

Similarly, the tie-in sales involved, constituted violations of Section 3 of the Clayton Act actionable by petitioner. *Standard Oil Co.* v. *United States*, 337 U.S. 293; *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, supra.

The Hoyt incident, therefore, was but "frosting on the cake" which indicated that ALD had a predatory intent, an intent unnecessary for petitioner to establish. See *United States* v. *Griffith*, 334 U.S. 100, 107, 108.

Moreover, without the "gun" statement by Hoyt, there was sufficient independent evidence introduced to cause the District Court to conclude that ALD did influence the Hoyt Manufacturing Corporation not to sell a dryer to petitioner.

For example, Hoyt testified at trial that his company had been "under pressure" to "do business entirely with ALD" (R.A. 369). An ALD representative conceded that he called Hoyt about the transaction in question (R.A. 1082, 1083). A representative of the Hoyt company, other than Mr. Hoyt, notified petitioner that the Hoyt Company was under pressure about the transaction in question (R.A. 211, 212). Hoyt acknowledged that he was filling orders for ALD when he held up petitioner's order (R.A. 355).

Thus, the District Court was amply justified in concluding, from evidence which the Court of Appeals did not question, that ALD had exerted pressure upon petitioner's supplier, Hoyt Manufacturing Corporation.

Finally, even if the Hoyt incident were critical to the case, the admission of the Hoyt deposition testimony could not be prejudicial error because it was corroborated by his later testimony (R.A. 369) and by the other testimony noted above. *Texas Pacific Ry. Co.* v. *Watson*, 190 U.S. 287, 291; *Chicago, M. & St. Paul Ry. Co.* v. *Harrelson* (C.A. 8, 1926) 14 F.2d 893; *Ralston Purina Co.* v. *Norak*, (C.A. 8, 1940) 111 F.2d 63.

III. The Harmless Effect of the Failure of Petitioner to Introduce Related Parts of a Deposition on Consecutive Pages of Transcript

The Court of Appeals complains of the lack of orderliness in the fact that relevant portions of the same deposition were separated by 1000 pages of the transcript in a non-jury trial. The Court of Appeals did not indicate how any prejudice to respondents could possibly accrue from such separation. There could be none. All of the relevant portions of the depositions became a part of petitioner's case before the total case was submitted to the District Court for consideration and decision. Respondents had ample opportunity by briefs, requests for findings and oral argument to make such use of all parts of the depositions as they saw fit. It could hardly be contended that, if the District Court relied on memory instead of a reading of the transcript, it would have remembered the earlier rather than the latter readings from deposition testimony.

The District Court did not commit prejudicial error in its handling of the depositions. *New Arcade Co.* v. *Owens*, (C.A. D.C., 1919) 258 F. 965.

IV. The Failure of the Court of Appeals to Find a Single Demonstration of Prejudice by the Trial Judge

As noted above under the Statement of the Case, the Court of Appeals, in its opinion, failed to identify one iota of evidence of bias and prejudice on the part of the trial judge. It was content to base this accusation on its unsupported statement that a reading of the record brought about this conviction. Its allusion to some unspecified instances of "cross-examination" on the part of the trial judge and its speculation that the "prejudice" was "perhaps" the result of the testimony about the gun, add nothing in substantiation of the charge. More precisely documented charges of prejudice on the part of a trial judge have been found wanting by federal appellate courts. *Dowell, Inc.* v. *Jowers*, supra; *Slattery* v. *Marra Bros.*, supra; *Scott* v. *Beams*, supra. An examination of the entire record of this case will show that the trial judge was not prejudiced but was impartial. This Court is in as good a position as the Court of Appeals to make that examination and determination.

Since the Court of Appeals' opinion was utterly bereft of reasons as to why, when and how the trial judge was prejudiced, its judgment in remanding the case for re-trial before a new judge should not be permitted to stand. This petitioner is a small concern which has lost money in its operations as the record shows (Ex. K, R.A. 1970). After its case was pending more than four years, it had its day in court and obtained a judgment after what must be considered a fair trial. Certainly, the Court of Appeals failed to show the contrary. The findings of the District Court, which were not even examined by the Court of Appeals, support the legal conclusions reached. It would be inequitable to subject petitioner to another long trial, seven

years after this case was filed, without a determination as to whether it should have prevailed on the merits.

Conclusion

For the foregoing reasons, petitioner requests that the writ of certiorari issue and that this Court either decide the case on the merits or, in the alternative, remand the case to the Court of Appeals for a consideration of the merits.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 5682.

WESTINGHOUSE ELECTRIC CORPORATION,

DEFENDANT, APPELLANT,

v.

WRAY EQUIPMENT CORP.,

PLAINTIFF, APPELLEE;

No. 5683.

ALD NEW YORK, INC.,

DEFENDANT, APPELLANT,

v.

WRAY EQUIPMENT CORP.,

PLAINTIFF, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, HARTIGAN, *Circuit Judge*, and JULIAN, *District Judge*.

John M. Hall, with whom *Rhodes G. Lockwood* and *Choate, Hall & Stewart* were on brief, for appellant in No. 5682.

Douglas L. Ley, with whom *Elliott V. Grabill*, *Nathaniel J. Young, Jr.*, and *Grabill, Ley & Mason* were on brief, for appellant in No. 5683.

James M. Malloy, with whom *Ralph Warren Sullivan* and *Morton Myerson* were on brief, for appellee.

OPINION OF THE COURT

February 2, 1961

HARTIGAN, *Circuit Judge*. These are appeals from a judgment of the United States District Court for the District of Massachusetts entered for plaintiff on March 25, 1960.

Plaintiff-appellee, Wray Equipment Corp., sued Westinghouse Electric Corporation (Westinghouse) and ALD New York, Inc. (ALD) for treble damages under the Sherman and Clayton Acts, 15 U.S.C. §1 et seq., alleging that the defendants and various co-conspirators had conspired and were conspiring to monopolize and unreasonably restrain interstate trade and commerce in half-hour launderette machinery and equipment, and that by various acts done in furtherance of this conspiracy plaintiff had been injured in its business.

The plaintiff alleged that the conspiracy and acts in furtherance of it included: (1) an agreement between Westinghouse and ALD that Westinghouse would not sell its nine pound laundry machines to any launderette machinery distributor other than ALD and that ALD would purchase nine pound machines only from Westinghouse; (2) pursuant to the agreement and with the approval of ALD, Westinghouse refused to sell its nine pound machines to plaintiff at any price; (3) with the approval of Westinghouse, ALD refused for several months to sell nine pound machines to plaintiff at a price lower than that charged individual launderette operators and subsequently ALD refused to sell nine pound machines to plaintiff at any price; (4) with the approval of Westinghouse, ALD used its exclusive right to distribute Westinghouse nine pound machines to cause prospective launderette operators desiring these machines to purchase from ALD their entire requirements of twenty-five pound laundry machines, dryers, etc.; (5) with the approval of Westinghouse, ALD used its exclusive right to distribute the Westinghouse nine pound machine as the basis for threatening manufacturers of twenty-five pound machines, boilers, dryers, etc. with a boycott if they did not discontinue making sales to the plaintiff. Plaintiff alleged, *inter alia*, that as a result of the conspiracy and the acts in furtherance of it, (1) plain-

tiff had been prevented from making sales of Westinghouse nine pound machines to launderette operators; (2) plaintiff had been prevented from making sales of boilers, dryers, etc. to launderette operators who desire to use Westinghouse nine pound machines; (3) manufacturers of the associated equipment have refused to sell to plaintiff and have refused to meet shipping commitments on machines already sold to plaintiff.

The case was tried by the district court sitting without a jury. An unnecessarily protracted trial of twenty-eight days was held during which a great deal of evidence was received by the court over the objection of the defendants. The district judge announced several times that in order to conduct the trial expeditiously he would receive the evidence but that it was subject to a motion to strike to be made at the conclusion of the trial. Motions to strike were made by the defendants at the close of the evidence. In the preface to its findings of facts and conclusions of law the lower court stated: "Defendant ALD submitted a Motion to Strike, which is denied."[1]

The court made findings of facts and conclusions of law that plaintiff was entitled to recover treble damages under the Sherman and Clayton Acts and entered judgment for the plaintiff.

Defendants in their appeals specify numerous errors, but we do not believe it is necessary to discuss all of them in the disposition which we make of this case.

We believe that the district court erred prejudicially by failing to grant defendants' motions to strike certain evidence objected to by the defendants. The president of Hoyt Manufacturing Corp., Harry Hoyt, was called as a witness by the plaintiff to testify in connection with an alleged at-

[1] The record does not contain any disposition by the court of defendant-Westinghouse's motion to strike certain evidence from the record.

tempt by ALD to have Hoyt Manufacturing Corp., a manufacturer of dryers, slow down delivery of a dryer to plaintiff. When Hoyt was asked at the trial if defendant ALD's employee Rowan had spoken to him about an order from plaintiff, Hoyt replied that he had no recollection of such a conversation. Plaintiff's counsel then asked: "Do you recall testifying on deposition in this case . . .?" Hoyt replied: "I recall making a deposition, yes, sir." Plaintiff's counsel then read from the deposition, stating he was so doing for two purposes, to refresh the witness' recollection and to indicate a prior inconsistent statement. At the conclusion of the reading, plaintiff's counsel asked Hoyt:

"Q. Do you recall so testifying, Mr. Hoyt?

A. If that is my deposition, I do.

Q. The statements you made there are true?

A. They would be, yes, sir."

On cross-examination Hoyt was asked:

"XQ. Do you have any memory now of the conversation you had with Mr. Rowan?

A. Other than what the deposition shows. [sic]

XQ. Did Mr. Rowan make any suggestions to you that the shipment to Wray Equipment Company be delayed?

A. I do not recall."

Earlier in his testimony when Hoyt was questioned by plaintiff's counsel in regard to the delay of shipment he said:

"Q. You have no recollection of these transactions, independent of the documents I must show you?

A. No, I haven't. I haven't had access to them. It has been, what, four or five years?

Q. You do recall that you testified at some length about these transactions?

A. I do.

The Court: You knew you were going to be a witness here?

The Witness: Yes, sir.

The Court: You knew you had answered some questions by way of deposition?

The Witness: Yes, sir.

The Court: Did it occur to you it would have been a good idea to refresh your recollection on the questions that you were asked in the deposition, at the time it was taken, when you knew you were going to be here?

The Witness: Mr. Malloy [counsel for plaintiff] said that he would have the deposition here."

In the deposition read during the trial Hoyt had stated: "That was one of my reasons [for delaying the plaintiff's order]. I tried to exercise a certain amount of prudence. If a man is going to hold me up, I am not going to find out whether he has a real bullet in his gun." The district judge in commenting on this testimony recognized that Hoyt was not testifying from his present recollection and said: "Figuratively speaking, someone put a gun to his head . . . He [Hoyt] gave an answer four and a half years ago, and he very frankly and honestly said: 'If I gave that answer under oath, my memory then was better than now, and that is the answer' and that is what I would expect a good citizen to say . . ."

The cases are clear, however, that a deposition used in an attempt to refresh the witness' recollection is not itself admissible as evidence. See *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940); 5 Wigmore, Evidence §1415 (3d ed. 1940). When a witness is unable to recall a past

transaction, the majority of the cases do not allow a prior statement of the witness concerning that transaction to be introduced as a prior inconsistent statement. See *Corsick* v. *Boston Elevated Ry.*, 218 Mass. 144, 105 N.E. 600 (1914); 3Wigmore, Evidence §1043 (3d ed. 1940).[2] We believe that the district court erred in receiving the deposition of plaintiff's witness Hoyt. The incorporation of Hoyt's gun figure of speech from his deposition in the court's opinion as well as frequent references to it by the court during the trial indicates that defendants were prejudiced by the admission into evidence of the deposition.

There is another matter which arose during the trial that warrants comment because it may be met again in a new trial. Parts of several other depositions were properly admitted and read into evidence by plaintiff's counsel. When counsel for the defendants sought then to have introduced other parts of these depositions relevant to those read into evidence, relying on F.R.Civ.P. 26(d)(4), the district court refused to allow such procedure. The court indicated that defendants could introduce the desired parts at a later time.[3]

We have been directed to no cases bearing directly on this point. Rule 26(d)(4) provides:

> "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."

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[2] Wigmore states that the basis of this exclusion is the possibility of improper testimonial effect being given to the prior statement. The instant case presents a forceful example of this danger.

[3] Toward the end of the trial the plaintiff's counsel offered the parts read by defendants' counsel as part of plaintiff's case and the court so noted. We do not believe that this step obviated the defect pointed out below.

The rule provides a method for averting, so far as possible, any misimpressions from selective use of deposition testimony. The opposing party is entitled under the rule to have the context of any statement, or any qualifications made as a part of the deponent's testimony also put into evidence. We believe that the spirit of the rule dictates that the opposing party should be able to require the introduction of the relevant parts of the deposition testimony at least at the conclusion of the reading of the deposition. In the instant case the supplementary relevant testimony authorized by the rule was separated by more than 1,000 pages of transcript from the deposition testimony introduced by the plaintiff. It seems to us that such wide separation of the relevant parts of a deposition unduly impedes the orderly consideration of the deposition testimony, even in a non-jury case.

We conclude from a careful reading of the record of approximately 2,000 pages that the trial judge was prejudiced in favor of the plaintiff. Several indications of this prejudice are manifest in his "cross-examination" of certain of the defendant's witnesses. Perhaps his prejudice was a result of Hoyt's reference to a gun in his deposition, which appears from the record to have made an extreme and unreasonable impression on the trial judge. Whatever the cause, the court's prejudicial attitude warrants a new trial before another judge.

We express no opinion on the merits of this case.

Judgment will be entered vacating the judgment of the district court and remanding the case for a new trial consistent with this opinion.

APPENDIX B

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. §1 so far as pertinent:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

Section 2 of the Sherman Act, 15 U.S.C. §2 so far as pertinent:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

Section 3 of the Clayton Act, 15 U.S.C. §14:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods,

wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 4 of the Clayton Act 15 U.S.C. §15:

Any person who shall be injured in his business or property by reason of anything forbidden in the anti trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. [illegible]

WRAY EQUIPMENT CORPORATION,

PETITIONER,

v.

WESTINGHOUSE ELECTRIC CORPORATION AND
ALD NEW YORK INC.,

RESPONDENTS.

BRIEF FOR RESPONDENTS WESTINGHOUSE ELECTRIC CORPORATION AND ALD NEW YORK, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. 885

WRAY EQUIPMENT CORPORATION,
PETITIONER,

v.

WESTINGHOUSE ELECTRIC CORPORATION AND ALD NEW YORK, INC.,
RESPONDENTS.

BRIEF FOR RESPONDENTS WESTINGHOUSE ELECTRIC CORPORATION AND ALD NEW YORK, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported in 286 F.2d [illegible] in Appendix A to the petition. [illegible] file an opinion. The District Court's Findings of [illegible] Conclusions of Law are found in the Consolidated Record Appendix beginning at p. 1623.

Question Presented

Whether the Court of Appeals for the First Circuit acted within the limits of its discretion in remanding this case for a new trial where the Court of Appeals found that the trial judge had improperly admitted certain evidence and that such evidence had influenced the trial judge in arriving at his decision in such manner that its admission was prejudicial error.

Statement of the Case

The respondents do not adopt the petitioner's statement of the case. Accordingly, there is set forth below a concise statement of the facts which are material to a consideration of the question presented.

This is an action begun in the United States District Court for the District of Massachusetts in which petitioner sought treble damages from respondents under the Sherman and Clayton Acts, 15 U.S.C. §1 et seq. Petitioner alleged (R.A. 13)[1] that respondents had conspired and were conspiring to monopolize and unreasonably restrain interstate trade and commerce in the distribution of equipment to so-called half-hour laundries and that by various acts in furtherance of this conspiracy petitioner had been [illegible] business.

The case was tried by the district court sitting without a jury. As the Court of Appeals for the First Circuit (hereinafter referred to simply as the Court of Appeals) stated in its opinion (App. A. 20): "An unnecessarily protracted trial of twenty-eight days was held during which

[1] Respondents have adopted in this brief the abbreviations used by petitioner in referring to the consolidated record appendix (R.A.) and the opinion of the Court of Appeals printed as Appendix A to the petition (App. A.).

a great deal of evidence was received by the court over the objection of the defendants. The district judge announced several times that in order to conduct the trial expeditiously he would receive the evidence but that it was subject to a motion to strike to be made at the conclusion of the trial. Motions to strike were made by the defendants at the close of evidence. In the preface to its findings of fact and conclusions of law the lower court stated: 'Defendant ALD submitted a Motion to Strike, which is denied.'" No disposition was made of respondent Westinghouse's motion to strike (App. A. 20, fn. 1).

The district court entered judgment for petitioner and respondents appealed, specifying numerous errors. The Court of Appeals selected one of the errors specified, namely, the district judge's failure to grant respondents' motions to strike the deposition testimony of the witness Hoyt, and held that the district judge's failure to grant the motions was prejudicial error (App. A. 20). The Court of Appeals found that: "The incorporation of Hoyt's gun figure of speech from his deposition in the court's opinion [R.A. 1628] as well as frequent references to it by the court during the trial indicates that defendants were prejudiced by the admission into evidence of the deposition." (App. A. 23). This is actually the ground on which the Court of Appeals vacated the judgment for petitioner and remanded the case for a new trial, as it is abundantly clear that the Court of Appeals had determined on a new trial long prior to its consideration [illegible] dicial attitude. See particularly the statement by the Court of Appeals at App. A. 23:

> "There is another matter which arose during the trial that warrants comment because it may be met again *in a new trial.*" (Emphasis supplied)

The Court of Appeals also stated at the end of its opinion (App. A. 24) that after reading with care the approximately 2000 pages of the record, it had concluded therefrom that the district judge was prejudiced in favor of petitioner and it therefore directed that the new trial be held before another judge (App. A. 24).

Summary of Argument

There is a short and conclusive answer to this petition for certiorari. It is, that the question alleged by petitioner to be presented was not decided by the Court of Appeals. The Court of Appeals reversed and remanded the case for a new trial, not on the ground asserted in the petition that the trial judge was prejudiced, but on the simple ground that the district judge had erred in improperly admitting certain evidence and that the error was sufficiently prejudicial to warrant a new trial. This action by the Court of Appeals does not conflict with any decision of this Court or of any other court of appeals and, being applicable solely to the facts of this case, has no significance beyond the confines of this litigation. As Mr. Justice Frankfurter stated in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74, this Court does not "sit for the benefit of particular litigants."

Argument

I. Petitioner Has Misconstrued the Court of Appeals' Decision and Opinion.

It is clear from the petition filed in this case that petitioner has misconstrued the decision and opinion of the Court of Appeals.

Petitioner has stated at page 10 of its petition that: "The principal reason for the Court of Appeals' vacating the district court's judgment in favor of petitioner and remanding for a new trial before a different judge was its conclusion that the trial judge was prejudiced." The same proposition is reiterated throughout the petition and, indeed, is the basis of petitioner's statement of the "Question Presented" (Pet. 2, 3).

As a careful reading of the Court of Appeals' opinion (App. A. 18-24) plainly indicates, the proposition so often repeated in the petition is clearly wrong. The Court of Appeals found (a) that the district judge had improperly admitted certain deposition testimony (a finding which petitioner does not seriously challenge) and (b) that once the evidence was admitted it had such an impact upon the trial judge that respondents were prejudiced by its admission (App. A. 20, 23). As the Court of Appeals stated at App. A. 24, the testimony "appears from the record to have made an extreme and unreasonable impression on the trial judge."

The Court of Appeals then went on to "comment" on the trial judge's handling of certain other evidence, because the question "may be met again in a new trial," (App. A. 23), and finally to state that because it had determined from a reading of the entire record in the case that the trial judge was prejudiced in favor of petitioner, the retrial of the case should be before another judge (App. A. 24). However, the decision of the Court of Appeals to remand the case for a new trial was quite obviously grounded on its opening conclusion appearing at App. A. 20:

> "We believe that the district court erred prejudicially by failing to grant defendants' motions to strike certain evidence objected to by the defendants."

II. The Petition Presents No Conflict of Decisions.

In *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502, the Court said that:

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393."

The same standard is, of course, stated in Rule 19 of the Revised Rules of the Supreme Court of the United States (1954 ed.) and was affirmed in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70.

Because petitioner has so patently misconstrued the Court of Appeals' decision and opinion, most of what is said in the petition is inapposite. That is particularly true of the conflict which petitioner has pretended to find between the decision of the Court of Appeals in the present case and the decisions of this Court and of other courts of appeals in the cases cited at pages 11 and 12 of the petition[2]

In each of the cases upon which petitioner relies as demonstrating the existence of a conflict, appellant urged that certain conduct of the trial judge evidenced prejudice and bias against appellant. In each case, the issue was whether appellant's objection to the conduct had been

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[2] *Becker Steel Co. of America* v. *Cummings*, 296 U.S. 74; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238, 239; *Scott* v. *Beams* (C.A. 10, 1941) 122 F.2d 777, 782, 789, cert. den. 315 U.S. 809; *Suburban Transit Corporation* v. *Malone* (C.A. 4, 1946) 156 F.2d 422; *Dowell, Inc.* v. *Jowers* (C.A. 5, 1950) 182 F.2d 576, 579; *Slattery* v. *Marra Bros.*, (C.A. 2, 1951) 186 F.2d 134, 137, cert. den. 341 U.S. 915; *Baker* v. *Mueller*, (C.A. 7, 1955) 222 F.2d 180, 183.

sufficiently timely so that he was entitled to insist, as a matter of right, that the appellate court consider the matter on appeal. Since the cases cited by petitioner were concerned with the issue of the trial court's prejudice and bias, rather than the prejudicial admission of evidence, and since respondents here made timely motions to strike the evidence (R.A. 1598, 1615), nothing which those cases decide conflicts with the decision of the Court of Appeals in the present case.

There is no conflict between the decision here and the cases cited by petitioner even if one ignores both (a) the distinction between prejudicial error and prejudice and bias and (b) the fact that respondents did make timely objections to the error on which the Court of Appeals based its decision. None of the cases cited by petitioner suggests that the court of appeals concerned would have committed reviewable error if it had chosen to consider the issue of the trial court's prejudice and bias when first raised on appeal, or even *sua sponte*, and had decided in appellant's favor. On the contrary, in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, the Court, quoting from its opinion in *United States* v. *Atkinson*, 297 U.S. 157, 160, stated that:

> "Of course appellate courts 'in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' "

Petitioner concedes this in the petition (Pet. 11).

III. The Decision of the Court of Appeals Was Based Upon a Finding of Fact.

In the present case, the Court of Appeals found that the erroneous admission of the Hoyt deposition testimony, which was actually quoted in the trial judge's decision (R. 1628), had in fact seriously affected the fairness of the trial in the district court (App. A. 23, 24). That finding was warranted because the district judge was the sole trier of fact, and by examining the entire record, the Court of Appeals was able to determine that the improperly admitted Hoyt deposition had "made an extreme and unreasonable impression on the trial judge" (App. A. 24). It is the Court of Appeals' finding that the evidence in question did in fact prejudicially influence the trier of fact which further distinguishes this case from the *Malone*, *Dowell*, *Slattery* and *Baker* cases (Pet. 11, 12), and from the cases cited at page 15 of the petition.[3] In each of those cases, the trier of fact was a jury and the effect thereon of a particular error could only be presumed.

Since the Court of Appeals' finding that the error was prejudicial was essentially a finding of fact, it is not a proper subject for review by this Court, which has said repeatedly that it should not interfere with the decision of a court of appeals where the latter's conclusions "depend upon appreciation of circumstances which admit of different interpretations" or, stated more simply, where "Proper decision of the controversy depends upon a question of fact." *Federal Trade Commission* v. *American Tobacco Co.*, 274 U.S. 543, 544; *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 400.

Obviously, such a finding is limited to the particular

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[3] *Texas Pacific Ry. Co.* v. *Watson*, 190 U.S. 287, 291; *Chicago, M. & St. Paul Ry. Co.* v. *Harrelson* (C.A. 8, 1926) 14 F.2d 895; *Ralston Purina Co.* v. *Novak*, (C.A. 8, 1940) 111 F.2d 631.

facts of the particular case. It produces no conflict of decisions and it involves no principle the settlement of which is important to the public as distinguished from the immediate parties. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74. Accordingly, a decision based upon such a finding, as was the decision of the Court of Appeals in the present case, should not be reviewed by this Court on a writ of certiorari.

IV. The Decision Below Was an Interlocutory One.

The petition seeks a review by this Court of a decision of the Court of Appeals remanding the case for a new trial (App. A. 24). Such an interlocutory decision is not a proper subject for a grant of certiorari in the absence of a showing that issuance of a writ "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, Tampa and Key West Ry.*, 148 U.S. 372, 384. There has been no such showing in the present case.

In fact, the decision of the Court of Appeals does not negate the possibility of other instances of reversible error, which could have been adverted to if deemed appropriate. See particularly the Court's opinion at App. A. 20, as follows:

> "Defendants in their appeals specify numerous errors, but we do not believe it is necessary to discuss all of them in the disposition which we make of this case."

It is also significant that the Court of Appeals took care to "express no opinion on the merits of this case", a further indication that the Court had determined as a fact

that the proceedings below had been sufficiently vitiated by error to require a new start.

V. The Petition Seeks Review of a Dictum.

After stating the Court of Appeals' holding that the respondents had been prejudiced by the admission of certain evidence, Judge Hartigan added by way of dictum a "comment" with respect to "another matter which arose during the trial . . . because it may be met again in a new trial." (App. A. 23). The matter upon which Judge Hartigan commented was the district judge's failure to comply with the requirements of Rule 26(d)(4) of the Federal Rules of Civil Procedure, regarding the use of deposition testimony (App. A. 23, 24).

Petitioner has assumed that Judge Hartigan's comment was one of the grounds for the Court of Appeals' decision (Pet. 8, 15). Clearly, the comment was intended as nothing more than an instructive dictum and as such, it is not a proper subject for review by this Court on a petition for certiorari.

VI. Respondents Took Timely Action to Preserve Their Rights.

While the propriety of granting certiorari in the present case does not depend upon the diligence of respondents in protesting the errors of the trial judge, it should be noted that petitioner's charge that respondents were dilatory in raising the issue of bias and prejudice is unfounded. At every stage of the proceedings in this case, respondents promptly noted and insisted upon their objections to those rulings and conduct of the trial judge which they conceived to be in error, including the deposition testimony of the witness Hoyt (App. A. 20). However, it was the cumulative

effect of those errors, confirmed beyond any doubt by the district judge's findings of fact and conclusions of law (R.A. 1623-1632), which was urged by respondents and found by the Court of Appeals to compel the conclusion that the district judge was prejudiced in favor of plaintiff (App. A. 24). It was upon the whole record that respondents relied in charging prejudice and it was the whole record that the Court of Appeals considered in sustaining the charge. It was a matter properly to be raised and properly to be considered on appeal and petitioner's assertion that the respondents were tardy in raising it is completely unwarranted. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-240.

Conclusion

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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